

ESTATE OF NELLIE BROWN

IBIA 82-34

Decided November 30, 1982

Appeal from order of January 11, 1982, by Administrative Law Judge Daniel S. Boos, denying petition for reopening. (Indian Probate No. IP BI 70B 82.)

Affirmed.

1. Indian Probate: Reopening: Generally

The Board has consistently held that petitions to reopen estates which have been closed for more than 3 years require compelling proof that the delay in requesting relief has not been occasioned by lack of diligence on the part of the petitioning parties.

2. Indian Probate: State Law: Generally

It is not a proper function of the Board of Indian Appeals to determine whether a state law is in violation of the United States Constitution.

3. Indian Probate: Limitation on Actions

In accordance with Department practice, the Board will consider four factors in ascertaining whether its quasi-judicial decisions may be applied retroactively: (1) the nature of the reliance placed upon the prior applications of law by the parties; (2) the harm or prejudice to those who relied upon previous principles of law; (3) the purpose of the law in light of public policy; and (4) the harm to the administration of justice and public purpose.

APPEARANCES: Allen B. Haddon, Esq., Santa Ana, California, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Background

Nellie Brown, Wichita Allottee No. 455 (decedent), died intestate on July 8, 1963, at the age of 75. Her second husband, George Lamb, predeceased her by less than 2 months. They had one child, who died as an infant. Decedent's first marriage was to Major Campbell. They had three children, Eunice, Willie, and Mollie. Only Eunice and Willie were living at the time of decedent's death and probate, Mollie having died in 1934. Mollie had two children, one of whom, George Clay Akeen (appellant), was living at the time of decedent's death and probate. Appellant was Mollie's illegitimate son by Tom (Lee) Punley Akeen.

A probate hearing for Nellie Brown's estate was held on September 10, 1963. Among those present were Eunice Campbell Swift, Willie Campbell, and appellant. The examiner of inheritance found, pursuant to Oklahoma law, Title 84, Section 213(l), that Willie Campbell and Eunice Campbell Swift were decedent's proper heirs and each was entitled to one-half of her estate. No petition for rehearing was filed.

On July 13, 1976, appellant filed a petition to reopen decedent's estate, alleging that he was incorrectly omitted as an heir. Administrative Law Judge Jack M. Short, in an order dated July 30, 1976, denied the petition, stating that appellant failed to provide compelling proof that he had been diligent in seeking the relief requested. Furthermore, the Administrative Law Judge held that, even if the petition were considered timely he would affirm the previous decision on the merits. No appeal was taken from this order.

Appellant filed a second petition for reopening on September 29, 1981. He based his petition on the repeal of the Oklahoma law which had denied him the right of inheritance and the Supreme Court's ruling in Trimble v. Gordon, 430 U.S. 762 (1977), concerning the denial of equal protection to illegitimate children. Administrative Law Judge Daniel S. Boos denied this second petition in an order dated January 11, 1982, stating that the appellant failed to demonstrate diligence in petitioning for reopening. ^{1/} This appeal followed.

Discussion and Conclusions

[1] Both Administrative Law Judges, in denying the appellant's petitions to reopen, cited his failure to seek the relief requested diligently. The Board has consistently held that petitions to reopen estates closed more than 3 years require compelling proof that the delay in requesting relief has not been occasioned by lack of diligence on the part of the petitioning parties. Estate of Katie Crossguns, 10 IBIA 141 (1982); Estate of Peter

^{1/} Judge Boos noted that, even considering the petition in the most favorable light, more than 3 years had passed since the Supreme Court's ruling in Trimble, and appellant failed to show diligent efforts since that time.

Feather Earring Cleveland, 6 IBIA 44 (1977). The decisions denying reopening in this estate are supported by the record and appellant has introduced no evidence to explain his delay of 18 years in seeking relief. See Estate of Wilma Florence First Youngman, 10 IBIA 3, 7, 89 I.D. 291, 293 (1982). Accordingly, we hold that appellant has failed to satisfy the requirement that reopening petitions be diligently presented. 2/

Appellant argues, however, that changes in Oklahoma law and constitutional law interpretation since decedent's probate in 1963 should be retroactively applied to prevent a manifest injustice. 3/ Prior to 1977, Oklahoma law precluded a child born out of wedlock from inheriting, by right of representation of his father or mother, "any part of the estate of his or her kindred, either lineal or collateral" unless his parents legitimated him by the statutory process (Okla. Stat., tit. 84, § 215 (1971)). In 1977, the State legislature amended this section to provide that: "For inheritance purposes, a child born out of wedlock stands in the same relation to his mother and her kindred * * * as if that child had been born in wedlock." The appellant's illegitimate status would, therefore, no longer prevent him from inheriting from the decedent's estate under the revised State law.

[2] Appellant asserts that Oklahoma's statutory change was based upon Trimble v. Gordon, *supra*, which struck down an Illinois law denying illegitimate children a right equal to that of legitimate children in inheriting from their fathers. The record includes no evidence of the Oklahoma legislature's motives or intent and appellant has offered no similarities between the Illinois and Oklahoma laws. 4/ Even if the Oklahoma and Illinois situations were similar, it is not a proper function of this forum to determine whether Oklahoma law violated the United States Constitution. Estate of Joyce Mary James, 4 IBIA 81 (1975); Estate of Florence Blue Sky Vessel, 1 IBIA 312, 79 I.D. 615 (1972).

2/ It is noted that appellant received actual notice of and was present at decedent's probate hearing. He was also given an opportunity to seek a rehearing and failed to do so. These factors also preclude granting a petition for reopening. 43 CFR 4.242(h).

3/ Without providing any analysis, appellant seeks support for his contentions from Zablocki v. Redhail, 434 U.S. 374 (1978); Trimble v. Gordon, *supra*; Mathews v. Lucas, 427 U.S. 495 (1976); Weber v. Aetna Casualty, 406 U.S. 164 (1972); and Allen v. Califano, 456 F. Supp. 169 (D. Md. 1978).

4/ The Illinois Probate Act permitted children born out of wedlock to inherit by intestate succession only from their mothers, maternal ancestors, and any person from whom the mother may have inherited, if living; children born in wedlock were able to inherit by intestate succession from both mothers and fathers. The Supreme Court found this to be a denial of equal protection because, *inter alia*, the State's approach attempted to impose sanctions upon children for adult conduct it was attempting to influence. Trimble and the other cases relied upon by the appellant are concerned with an illegitimate's rights of inheritance from the father, and the possible difficulties in proving paternity.

Furthermore, the language of the amended statute does not indicate a legislative intent to apply the law retroactively. In fact, section 2 of Laws 1977, ch. 36, provides that the effective date of the law was October 1, 1977. Appellant has made no showing that Oklahoma intended the 1977 amendment to have anything other than a prospective effect.

[3] The Board is thus asked to give retroactive effect to the statutory change despite an opposite intent expressed by the Oklahoma legislature. In such situations the courts have looked to four considerations in ascertaining whether laws should be applied retroactively: (1) The nature of the reliance placed upon the prior applications of law by the parties; (2) the harm or prejudice to those who relied upon previous principles of law; (3) the purpose of the law in light of public policy; and (4) the harm to the administration of justice and public purpose. Linkletter v. Walker, 381 U.S. 618 (1965); Safarik v. Udall, 304 F.2d 944 (D.C. Cir. 1962). The Department has applied the above criteria in its administration of Federal programs and responsibilities. Solicitor's Opinion, 84 I.D. 54, 62 (1976).

When the Department has determined that a different statutory interpretation is more appropriate than that reflected in earlier decisions, it has generally refused to give the later interpretations retroactive effect. This has been especially true where retroactive application would adversely affect actions taken and the rights and interests acquired by private persons based on earlier interpretations and the retroactive application would inure to the benefit of other private persons. Safarik v. Udall, *supra* at 949.

All interest in decedent's allotted lands vested in decedent's two living children 18 years ago. Equitable as well as legal considerations must enter into the Board's determination of whether the finality of a 1963 probate decision should be disturbed. Estate of Youngman, *supra*. Appellant has made no showing that decedent's heirs, who relied upon the previous Oklahoma law to determine their rights to decedent's estate, will not be substantially harmed or prejudiced by a retroactive application of the 1977 statute. Furthermore, such a holding by the Board could impact all similarly situated Indians who were denied inheritance due to their status as illegitimate children under Oklahoma law prior to 1977. Final probate decisions in other states where legislative reforms have occurred could also be placed in limbo. Such broad impacts would result in excessive harm to the administration of estates of deceased Indians and the nationwide stability of land titles. Assuming, therefore, that it were within the Board's discretionary authority to grant reopening in this case on the grounds raised, the equitable considerations weigh against reopening and the granting of retrospective application of state law.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 11, 1982, decision of the Administrative Law Judge denying petition for reopening is affirmed.

This decision is final for the Department.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Jerry F. Muskrat
Administrative Judge